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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-786

LLOYD A. FRY ROOFING COMPANY,
A CORPORATION,
Petitioner,

vs.

ILLINOIS POLLUTION CONTROL BOARD, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, THE COUNTY OF COOK, A BODY POLITIC, VILLAGE OF SUMMIT, REV. LOUIS HEMMERICH, ET AL.,
Respondents.

REPLY BRIEF IN OPPOSITION TO BRIEF OF RESPONDENTS HEMMERICH, ET AL. AND IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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ARGUMENT.

I.

THE DECISION BELOW CONFLICTS WITH AND INDEED FLAUNTS THE HOLDINGS OF THIS COURT IN CASES SUCH AS UNITED STATES v. L. COHEN GROCERY, 255 U. S. 81 (1920), CONNALLY v. GENERAL CONSTRUCTION COMPANY, 269 U. S. 385 (1926), CLINE v. FRINK DAIRY COMPANY, 274 U. S. 445 (1927), GIACCIO v. PENNSYLVANIA, 382 U. S. 399 (1966) AND PAPACHRISTOU v. CITY OF JACKSONVILLE, 405 U. S. 156 (1972) THAT STATUTES AS VAGUE, INDEFINITE AND UNCERTAIN AS THE ILLINOIS ENVIRONMENTAL CONTROL ACT VIOLATE DUE PROCESS. IF THE DECISION BELOW IS PERMITTED TO STAND, THERE WILL BE NO GUIDELINES WHATSOEVER UPON WHICH PERSONS MAY BASE THEIR CONDUCT SO AS TO PREVENT A CONVICTION FOR "AIR POLLUTION" UNDER THE ILLINOIS ACT AND SIMILAR STATUTES.

At the outset, Petitioner must respectfully submit that the attitude which pervades the Individual Respondents' Brief has no place before this Court. Certainly, name-calling, the protestation of good intentions and the involvement of Fry in different litigation do not meet the substance of the Petition for Certiorari. Petitioner contends, and earnestly so, that the Constitution and law of the land are the paramount factors in any question of statutory validity and that the passions of a cause, no matter how worthy, cannot outweigh that overriding precept.

Indeed, the very fact that the Individual Respondents have approached this case on the basis of emotionalism highlights the fact that the Illinois Act is unconstitutionally vague; its lack of standards necessarily leads to such an approach. Surely, a statute which provides for conviction and a $50,000 fine on the

sole basis of a finding of "unreasonabl[e] interfere[nce] with the enjoyment of life or property" not only permits but indeed encourages the type of persecutions and inquiries prohibited by this Court in *United States* v. *L. Cohen Grocery*, 255 U. S. 81 (1920). The Act is clearly insufficient to permit "men of common intelligence" to do anything more than "guess at its meaning and differ as to its application" (*Cline* v. *Frink Dairy Company*, 247 U. S. 445, at p. 459 (1927)).

While the Individual Respondents state that the Act has "sufficient standards," they point to none. The reason, Petitioner submits, is obvious. This Act is virtually indistinguishable in its absence of standards from those statutes held unconstitutional in *L. Cohen Grocery* and *Cline* v. *Frink Dairy Company*.

The cases discussed by the Individual Respondents are totally without application here. Thus, their assertion that *Oriental Boulevard Co.* v. *Heller*, 27 N. Y. 2d 212, 316 N. Y. S. 2d 226, 265 N. E. 2d 72 (appeal dismissed, 401 U. S. 986 (1971)) is "remarkably similar" to this case is bald misstatement. In *Oriental*, a municipal ordinance was attacked on the grounds that it was beyond the city's authority (the State having allegedly pre-empted the field), that it would be difficult for plaintiffs to comply therewith, and that the ordinance could be read as providing for the summary sealing of some offending equipment without notice and hearing. *No claim at all was made that the ordinance was vague, indefinite or uncertain.*

Boyce Motor Lines v. *United States*, 342 U. S. 337 (1952) involved an I. C. C. regulation far more detailed and specific than the Act at bar. Indeed, that long standing regulation, drafted with the extensive participation of the trucking industry, required proof of a *willful* violation. It also clearly prohibited the transportation of inflammable liquids through tunnels, the *very* offense with which defendant there was charged (342 U. S. at pp. 339, 341-2).

Metropolitan Sanitary District v. *U. S. Steel,* 41 Ill. 2d 440 (1968) was cited by the Illinois Appellate Court in its opinion. But that case stands only for the proposition that a word which is *undefined* in a statute (there "pollution") may be interpreted by reference to the common law. On the other hand, the Act at bar contains its own "definition" of pollution and the Illinois courts have specifically held that a charge of "unreasonable interference with the enjoyment of life and property" thereunder *cannot* be analogized to a common law cause of action (Appendix A to Petition for Certiorari, p. A14; *Mystik Tape* v. *Pollution Control Board,* 16 Ill. App. 3d 778, at p. 799 (1973)). Indeed, it is the Act's very "definition" which is unconstitutionally vague. Obviously, *Metropolitan* has nothing to do with this case.

In *Houston Compressed Steel Corp.* v. *Texas,* 455 S. W. 2d 768 (1970), defendant's conduct (outdoor burning) was specifically prohibited by regulation and the defendant made *no* claim that the statute or regulations were unconstitutionally vague.

Clearly then, the contentions of the Individual Respondents are without merit and the cases they cite without application. Petitioner respectfully requests that its Petition be allowed.

II.

UNDER THE ILLINOIS ENVIRONMENTAL PROTECTION ACT, A CHARGE OF VIOLATION MAY BE BROUGHT IN CRIMINAL COURT OR IN A SO-CALLED "ADMINISTRATIVE" PROCEEDING. BUT AN ADMINISTRATIVE DEFENDANT IS SUBJECT TO A GREATER MONETARY PENALTY THAN A CRIMINAL DEFENDANT CHARGED WITH THE SAME OFFENSE. YET AN ADMINISTRATIVE DEFENDANT IS DENIED THE RIGHT TO A TRIAL BY JURY, DENIED THE RIGHT TO A TRIAL UNDER THE RULES OF EVIDENCE AND DENIED THE RIGHT TO PROOF OF GUILTY BEYOND A REASONABLE DOUBT. SINCE THE STATE MAY ARBITRARILY PICK AND CHOOSE BETWEEN THESE TWO MEANS OF ENFORCEMENT, THE ACT VIOLATES EQUAL PROTECTION AND DUE PROCESS.

Much like the Illinois Attorney General, the individual Respondents have elected to respond to this section of the Petition with a request that form be elevated over substance. But Petitioner submits that it does not matter whether a Board proceeding has been initiated by the State or by an individual. The Board here decided an obvious adversary proceeding. It convicted Fry of statutory violation and imposed a $50,000 fine. The nature of that proceeding was such that the right to a fair trial, guaranteed to a criminal defendant under the Act, cannot be denied to an "administrative" defendant, as it was below. The identity of the complainant is beside the point.

Nor are these Respondents correct in their assertion that Board proceedings are the only available method which individuals might pursue. Obviously, private citizens can initiate criminal complaints and file civil lawsuits. But so long as criminal proceedings are an available alternative under the Act, Board proceedings must also conform to due process; if not, substantial rights have been denied.

Finally, Petitioner must point out that the State of Illinois was a very real and significant party to the proceedings

below. Fry's petition for a variance formed virtually no part of the proceedings from the very outset. Nonetheless, the State thereafter actively participated in the hearings, clearly assisting the Individual Respondents. It supplied witnesses, including so-called "experts", to testify against Fry. Its attorneys were every bit as active as those representing the Individual Respondents. Even if there were any significance to the fact that the Complaint for statutory violation was not filed by the State it would not affect the proposition that Fry was denied its guaranteed rights.

III.

THE ILLINOIS ENVIRONMENTAL PROTECTION ACT AND THE POLLUTION CONTROL BOARD'S PROCEDURAL RULES GUARANTEE THAT A DEFENDANT HAS THE RIGHT TO SUBMIT WRITTEN AND ORAL ARGUMENT. BUT THE BOARD HERE REFUSED TO PERMIT FRY TO SUBMIT WRITTEN OR ORAL ARGUMENT AND THE APPELLATE COURT'S DECISION UPHOLDING THE BOARD IS IN CLEAR CONFLICT WITH THE STATUTE, THE BOARD RULES, THE CONSTITUTION AND THE LAW OF THIS COURT.

There can be no doubt that the contentions of the Individual Respondents with respect to this section are patently frivolous. Petitioner has said far more than that it was "treated unfairly" because the Board refused to permit written or oral argument. What Petitioner has stated is that the Board consciously and wilfully ignored the clear language of the Statute and its own Rules. That language grants a defendant the absolute right to at least file a written brief and requires that the Board must consider that brief and oral argument before it rules. The Board has no "discretion" to disregard those clear mandates. The right to make argument after the close of the hearing is one which cannot be denied under the Statute, the Board Rules or the law of the land.

And notwithstanding the innuendos advanced by the Individual Respondents, Petitioner pointed out to this Court that the facts in "second *Morgan*" (*Morgan* v. *United States*, 304 U. S. 1 (1938)) differed from those at bar. Nonetheless, that case is clear authority for the proposition that the actions of the Board below denied Fry due process, even without reference to the unequivocal language of the Statute and Rules. Petitioner respectfully requests that this Court should grant review.

CONCLUSION.

Petitioner respectfully prays that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

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